DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1681/1dn
PJK:cjs:jf

March 18, 2003

1. The state Supreme Court has regulatory authority over attorneys and the legal profession. Supreme Court Rule (SCR) 35.015 (1), which is effective July 1, 2003, requires a GAL to have 6 hours of GAL education during the combined current and immediately preceding reporting periods, and at least 3 of those hours must be family court GAL education under SCR 35.03 (1m), which is also effective July 1, 2003, and which includes, under SCR 35.03 (1m) (a) 4., "the dynamics and impact of family violence."

I did not change the hours in s. 757.48 (1) (a) in the draft to avoid any conflict with the SCRs and since SCR 35.03 (1m) (a) 4. seems to address the GAL education concern that you have. In addition, the statute is less specific than the SCR on when the CLE hours must be completed. The statute requires 3 hours, but does not specify if those hours are during the current reporting period, for all time, etc.

Bob Nelson, whose subject area includes the SCRs, was unaware and very surprised that the statutes specify hours, because of the authority of the Supreme Court to regulate the area and the separation of powers issue.

2. This draft does not include a listing of the types of evidence that a court may consider for determining whether domestic violence has occurred. Because the suggested list comes from the Administrative Code and is to be used by W–2 agencies, it is not appropriate for use by courts. The types of evidence included on the list do not comply with the rules of evidence, which must be followed in legal proceedings. Including many of the listed types would require providing exceptions to the rules of evidence in chs. 885 to 911. I have discussed this issue with (the same) Bob Nelson, who drafts "Courts and Procedure," and neither he nor I want to read and assess every section in chs. 885 to 911 to determine if an exception needs to be made unless you are positive that you want to include the list of types of evidence and provide exceptions to the rules of evidence.

Besides having to make exceptions to the rules of evidence, I have a number of concerns about including the list. First, I am not sure who you want to use the list. The court? Mediators? Guardians ad litem? All of them? Chapter 767 currently contains numerous references to "evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am)." (See ss. 767.11 (8) (b) 2. and (10) (e) 2. and 767.24 (1m) (b), (c), and (o), (2) (b) 2. c., and (5) (i).) What

constitutes "evidence" is not specified for those sections and I have never heard that this is a problem. Determining what evidence is permissible, admissible, and relevant is what courts do, based on the rules of evidence. Secondly, each situation is different. By listing what evidence may be used to corroborate domestic abuse, you may be leaving out other types of evidence that a court would consider in a particular case. There may be situations in which the types of evidence included on the list do not exist. In court, oral testimony is usually the most important. The suggested list doesn't even mention oral testimony and is heavy on written statements. In court, written statements may not even be admissible because the demeanor of a witness is important. If your concern is mediators, common sense as to what evidence to consider should be all they need for their purposes, which are not adjudicatory. Current law allows a mediator to terminate mediation if there is evidence of interspousal battery or domestic abuse without listing what constitutes evidence. For the mediator's purposes, considering evidence that consists of nothing more than a party's statement does not violate due process. Even if there is nothing more than a party's statement that domestic abuse occurred, that is evidence.

If you still feel that you need to include a list of the types of evidence of domestic abuse, please be specific about who is to use the list. If the court must use the list, Bob and I will have to go through chs. 885 to 911 to determine where we need to provide exceptions for the items on the list.

3. As I discussed with Tom Powell, there is no statutory provision, that I could find, that allows the parties in a divorce or other family action to waive mediation. If the parties disagree on custody or physical placement, they must attend at least one mediation session, unless the court decides that attending a session would cause undue hardship or would endanger the health or safety of a party. Therefore, this version of the draft does not require anyone to inform the parties that they may waive mediation, because under current law they cannot.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266–2682
E–mail: pam.kahler@legis.state.wi.us